

Vinson&Elkins

Mark H. Tushnet III mhtushnet@velaw.com
Tel 202 638 6800 Fax 202 638 6804

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2006 DEC 11 P 4 25

December 11, 2006

VIA HAND DELIVERY

Ms Mary W Dove
Commission Secretary
Federal Election Commission
999 E Street, N W
Washington, DC 20463

Re MUR 5758

Dear Ms Dove

On behalf of respondent Pierce O'Donnell, we have enclosed one original and ten copies of Mr O'Donnell's probable cause brief in the above matter Please stamp the enclosed receipt copy and return it to our messenger

Thank you for your attention to these matters

Very truly yours,


Mark H Tushnet III
David E Hawkins

Attorneys for Pierce O'Donnell

Enclosures

cc Audra L Wasson, Esquire (with three copies of enclosure)

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13044323204

BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of

Pierce O'Donnell

MUR 5758

BRIEF OF RESPONDENT PIERCE O'DONNELL

1 I INTRODUCTION

2 In its October 26, 2006, brief, General Counsel recommends that the Federal Election
3 Commission find probable cause to believe that Pierce O'Donnell knowingly and willfully
4 violated 2 USC § 441f. While the facts underlying the alleged reimbursements of political
5 contributions are largely undisputed, equally incontrovertible psychological evidence establishes
6 that Mr. O'Donnell suffered – and continues to suffer – from Bipolar Disorder, a severe mental
7 illness that has already caused tragic personal and professional misfortune for Mr. O'Donnell.
8 As a matter of law, however, this mental illness prevented Mr. O'Donnell from forming a
9 “knowing and willful” intent to commit the alleged violations of section 441f. Notwithstanding,
10 Mr. O'Donnell remains committed to conciliation of this matter, consistent with his position
11 from the onset of the investigation.

12 II BACKGROUND¹

13 A Procedural History

14 On June 6, 2003, the Commission notified Pierce O'Donnell of allegations that certain
15 contributions to the Edwards for President committee in the 2004 presidential election had been
16 reimbursed by entities other than the named donor. For more than two years thereafter,
17 undersigned counsel participated in extensive discussions, factual proffers, and negotiations in
18 connection with conciliation efforts. In particular, undersigned counsel worked diligently to

¹ The facts set forth in this brief are subject to Rule 408 of the Federal Rules of Evidence.

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1 comply with FEC staff requests after the Commission's reason-to-believe findings in April 2004
2 Counsel for Mr O'Donnell and his firm provided detailed information to General Counsel
3 during the investigation, including (1) a detailed proffer, including a chronology of the events
4 surrounding the alleged violation, (2) a series of more detailed responses to staff questions
5 between April and June 2005, (3) responses to specific written interrogatories and document
6 requests propounded May 25, 2005, (4) follow-up coordination of additional requests for
7 information by the General Counsel in June 2005, (5) facilitation of discussion between FEC
8 staff and counsel for persons identified as conduits, which continued through March 2006, and
9 (6) numerous meetings through May 2006 with FEC staff to provide information, clarification,
10 and discussion of issues² These communications were advanced in a spirit of cooperation
11 toward conciliation, which General Counsel acknowledged was the desired resolution, and are
12 contrary to statements in General Counsel's brief that Mr O'Donnell, in the face of the
13 Commission's initial filing, remained silent, refused to cooperate, and stood on his constitutional
14 rights

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² Certain witnesses, through counsel, indicated an intent to assert their privilege in this matter because of a concurrent state proceeding in California. This invocation of privilege did not interfere with General Counsel's inquiry because information received through attorney proffers and the disclosure of requested documents provided all the relevant information to proceed with conciliation.

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Mr O'Donnell does not attempt to avoid responsibility for his acts, to the contrary, he stands ready to resolve this matter with the Commission on the basis of the facts and circumstances as they actually exist.³ However, in light of the serious mental health issues discussed below, Mr O'Donnell cannot truthfully admit to knowing and willful conduct which, as a matter of both fact and law, he was incapable of committing

B Mr O'Donnell's Background

The Commission's Brief highlights Mr O'Donnell's background in order to argue that his intellectual and professional capabilities and achievements support a finding that his actions were knowing and willful. However, that misses the point that is at issue in this matter. Despite Mr O'Donnell's background, he suffers from a serious mental illness that interfered with his judgment and significantly influenced his handling of the Edwards' contributions. As a result of a serious mental illness ("on the onset of the most profound phase of his life", Miami at 11), he was significantly impaired in his judgment and capacity to form the requisite intent. That is the point which distinguishes this conduct from General Counsel's description of Mr O'Donnell's background. Bipolar Disorder is an extremely serious and debilitating mental illness, and it had a dispositive effect

³ While it is not the intention of this brief to address factual allegations contained in General Counsel's brief, we do wish to note a significant discrepancy between the facts alleged in the brief and the evidence actually before the Commission. In particular, General Counsel's brief alleges that "O'Donnell wrote personal checks," some of which "contained the word 'bonus' on the memo line" GC Brief at 5 10-13. In fact, there is no evidence before the Commission that O'Donnell *personally* prepared the checks or included the typed "bonus" notation on certain of the checks.

1 The anecdotal information about Mr O'Donnell's conduct during this period of serious
2 mania, including the campaign contribution episodes, graphically illustrates and supports the
3 consequences of his mental illness. Numerous witnesses described to the psychiatric evaluators
4 Mr O'Donnell's bizarre behavior during this period. It included all too frequent episodes of
5 irritable mood swings, financially reckless decisions, stressful discussions, and, importantly, a
6 dismissive reaction to concerns raised by family, friends, and colleagues. His world was also
7 filled with episodes of compulsive spending, impulsive decision making, grandiosity, and
8 distortion. This behavior, according to each of the mental health professionals who separately
9 evaluated Mr O'Donnell, resulted in seriously impaired judgment and a disabled thought
10 process, both of which are classic symptoms of Bipolar Disorder.

11 General Counsel's brief also does not address recent developments in Mr O'Donnell's
12 firm. Largely as a result of the ongoing investigation, the firm has become a shadow of its
13 former self. At its largest (as it was during the time of the conduct alleged), the firm employed
14 over 50 people, including two dozen lawyers. The firm today has five personnel with only two
15 lawyers. Much of this downsizing has been of Mr O'Donnell's own doing; his therapists have
16 urged that he undertake extreme measures to cut financial and interpersonal stresses with which
17 he is simply unable to cope. Moreover, this investigation has taken a heavy personal toll on Mr
18 O'Donnell. In addition to the psychological stress (which he can ill afford) resulting from the
19 current investigation, financial obligations leave him in precarious financial condition. Mills at
20 3. All of this has been equally taxing on his relationships with his wife and children.

21 C Diagnosis of Bipolar Disorder

22 Bipolar Disorder is a serious psychiatric condition that profoundly distorts the ability to
23 control one's behavior.

1 Bipolar disorder, also known as manic-depressive illness, is
2 a brain disorder that causes unusual shifts in a person's mood,
3 energy, and ability to function. Different from the normal ups and
4 downs that everyone goes through, the symptoms of bipolar
5 disorder are severe. They can result in damaged relationships,
6 poor job or school performance, and even suicide. But there is
7 good news: bipolar disorder can be treated, and people with this
8 illness can lead full and productive lives.

9 National Institutes of Mental Health ("NIMH"), Bipolar Disorder, 2001, available at
10 <https://www.nimh.nih.gov/publicat/bipolar.cfm>

11 Manic-depression distorts mood and thoughts, incites dreadful
12 behaviors, destroys the basis of rational thought, and too often
13 erodes the desire and will to live. It is an illness that is biological
14 in its origin, yet one that feels psychological in the experience of
15 it, an illness that is unique in conferring advantage and pleasure,
16 yet one that brings in its wake almost unendurable suffering and,
17 not infrequently, suicide.

18 I am fortunate that I have not died from my illness,
19 fortunate in having received the best medical care available, and
20 fortunate in having the friends, colleagues, and family that I do.

21 Kay Redfield Jamison, Ph.D., An Unquiet Mind, at 6 (Knopf 1995) (Dr. Jamison herself
22 suffers from Bipolar Disorder and, as a faculty member at Johns Hopkins Medicine, is a highly
23 accomplished expert in the field). In fact, "[c]ompleted suicide occurs in 10%-15% of
24 individuals with Bipolar I Disorder." Diagnostic and Statistical Manual of Mental Disorders, 4th
25 Edition ("DSM-IV"), at 352 (American Psychiatric Association 1994).

26 Mr. O'Donnell's diagnosis of Bipolar Disorder followed extensive evaluation by
27 numerous mental health experts, including Mark J. Mills, J.D., M.D., Daniel A. Martell, Ph.D.,
28 Burt Crausman, Ph.D., and Joseph N. Kenan, M.D. Dr. Mills is a forensic psychiatrist who
29 regularly advises the United States Department of Justice on forensic psychiatric issues. His
30 curriculum vitae is attached as an exhibit. Dr. Martell is a forensic neuropsychologist who was
31 asked by the California State Bar's Lawyer Assistance Program to evaluate the effect of this

1 mental disease on Mr O'Donnell's conduct and a prognosis for treatment Dr Crausman is a
2 clinical psychologist who for nearly five years has treated Mr O'Donnell for the mental illness
3 diagnosed Dr Kenan is a clinical psychiatrist who is currently treating Mr O'Donnell and who
4 prescribes medication to control Mr O'Donnell's Bipolar Disorder The written findings of each
5 of these experts are attached as exhibits ⁴

6 These reports conclude that Mr O'Donnell has been suffering from this severe mental
7 illness for a number of years ⁵ These diagnoses are based on extensive testing with objective
8 mental health batteries, numerous mental status evaluations, and a documented history of
9 aberrant behavior In connection with his ongoing psychotherapy, Mr O'Donnell has recently
10 begun daily therapy with prescription medication Dr Kenan prescribes Lamictal, a powerful
11 mood stabilizing drug, as maintenance therapy to delay the occurrence of Mr O'Donnell's
12 hypomanic episodes Kenan at 1

13 As is typical of Bipolar Disorder, Mr O'Donnell's condition has intensified over the
14 years such that his condition had recently become even more severe than it was during the period
15 of the conduct alleged in this case Most importantly, this diagnosis shows a "a direct nexus
16 between his Bipolar Disorder and the campaign fund-raising behavior" at issue here Martell at
17 11 Dr Mills describes Mr O'Donnell's symptoms in detail

18 the multiplicity and increasing frequency of his financial
19 mismanagement, during a period that both preceded and followed
20 the political contribution, demonstrates convincingly, in light of
21 this newly available history from multiple sources, that his
22 hypomania and its associated poor judgment has endured for more
23 than a decade and (sadly for him) appears to be intensifying To
24 my mind then, Mr O'Donnell's Extrajudicial contributions

⁴ These reports are referenced herein according to the name of the author, i.e., Mills,
Martell, Crausman, and Kenan

⁵ Mr O'Donnell's precise diagnoses include Bipolar I Disorder-Hypomanic, Bipolar II
Disorder-Hypomanic, and Cyclothymic Disorder

1 were not knowing and willful, as I understand that term in a legal
2 context

3 Mills at 3-4 Specifically, the forensic conclusion is that Mr O'Donnell's severe mental illness
4 prevented him from having the requisite "knowing and willful" intent to violate the law With
5 respect to the relevant time period, Dr Martell similarly explains

6 [O'Donnell] was in the midst of the most profound Manic Episode
7 of his life at that time, and was significantly impaired with regard
8 to his capacity to regulate his behavior and exercise sound, rational
9 judgment His grandiose need to be seen as a "big shot," as a legal
10 superman capable of accomplishing anything, coupled with the
11 ego-dystonic fear of the loss-of-face that would result from failing
12 to live up to the excessive financial commitments he had
13 impulsively made, overwhelmed his capacity for good judgment

14 Martell at 11

15 Dr Mills similarly found that

16 Mr O'Donnell's biological illness altered and distorted his
17 judgment to the point where, despite the explicit concerns of Ms
18 Valdez, he perceived the legal requirements of [the] McCain-
19 Feingold [law] as irrelevant to his financial pledge and subsequent
20 conduct His psychiatrically-illness-mediated distortion is all the
21 more evident in the fact that he had behaved similarly previously
22 (the Hahn campaign contribution) and had stood for election
23 himself, as he was intellectually conversant with the apposite legal
24 requirements

25 Mills at 4

26 Both Dr Martell and Dr Mills determined that the impairment was controlling

27 [O'Donnell's] level of insight and behavioral control are impaired
28 While he retains some capacity "in the moment" to recognize his
29 own maladaptive behaviors, there are serious deficits in his ability
30 to inhibit himself or effect appropriate changes when needed

31 Martell at 5

32 [I]n approving reimbursements to his firm's employees for
33 contributions to the Edwards campaign, Mr O'Donnell was
34 influenced largely by his ongoing bipolar disorder such that
35 although he knew (intellectual awareness) what his conduct was[.]

1 doing it was neither willful (intentionally disregarding the law) nor
2 deliberate (recklessly disregard to the law) Instead, because
3 of his illness, Mr O'Donnell could not have formed the intent
4 required, and as a result, could not accurately perceive the
5 applicability of the law to his personal situation

6 Mills at 4-5⁶

7 1 O'Donnell's History Supports Diagnosis of Bipolar Disorder

8 The expert diagnoses of Mr O'Donnell's Bipolar Disorder do not hinge on an isolated
9 event or series of events The experts explain that the alleged conduct at issue in this case is only
10 a small part of a lengthy history -- beginning even before Mr O'Donnell's birth -- that supports
11 the diagnosis of Bipolar Disorder

12 Mr O'Donnell has a family history of mental illness, and, as Dr Martell explains, many
13 severe mental disorders are genetic

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17 The mental health experts have also documented a long history of behavior in this period
18 of Mr O'Donnell's own life consistent with a profound inability to control the compulsions
19 resulting from Bipolar Disorder Dr Martell notes that Mr O'Donnell has made irrational and
20 compulsive business decisions with disastrous financial consequences For example, he founded
21 a weekly newspaper with the grandiose goal of taking on the established paper in the region and
22 winning a Pulitzer Prize To support this venture, he personally penned 440 columns in two
23 years and covered payroll shortfalls out of his own pocket He has failed at attempts to start a

⁶ Although Drs Crausman and Kenan have not undertaken a full forensic analysis of Mr O'Donnell's mental health at the time of the alleged conduct, both experts note that "Mr O'Donnell's disorder has regularly and significantly impaired his judgment" and that "but for his mental illness, he would not have acted in a way that has led to his investigation." Crausman at 1-2, Kenan at 1.

1 cellular telephone company, invest in a Washington, D C , hotel, and buy part of a radio station
2 He paid for a costly renovation of his former residence, only to sell the property upon completion
3 of this extensive custom project He has invested in risky high-tech securities and has been
4 unable to liquidate those positions despite major adverse market movement Martell at 9, Mills
5 at 3

6 Dr Martell notes that, from the late 1990s into the period involving the campaign
7 contributions at issue - a period of "astounding" activity and productivity - Mr O'Donnell was
8 also fundraising in the most profoundly manic period in his life During that time, in addition to
9 the fundraising activities at issue here, Mr O'Donnell wrote and published a book, authored five
10 screenplays, produced one as a feature-length movie, founded a youth baseball foundation, raised
11 money for two baseball fields, joined numerous charitable boards, produced Shakespeare in the
12 Park, consulted with the Pasadena Superintendent of Schools, and successfully led his law firm
13 Yet, a careful review of all the available data suggests that his actions in reimbursing employees
14 for campaign contributions were psychiatrically, not criminally, motivated Martell at 9, Mills
15 at 4

16 As recently as this year, Mr O'Donnell has engaged in wasteful inappropriate spending
17 consistent with Bipolar Disorder For example, despite his own deteriorating financial condition
18 and that of his firm, he spent at least \$120,000 on three round-trip business jet charters to New
19 Orleans Mills at 2 Such irrational behaviors remain largely unrecognized by Mr O'Donnell,
20 leading his accountant and others familiar with his conduct to become increasingly worried about
21 his mental health Irrational spending is consistent with the grandiosity often associated with
22 Bipolar Disorder Id.

2 Bipolar Disorder Co-Exists with Successful Law Practice

2 Importantly, Bipolar Disorder is not necessarily an impediment to achieving great
3 professional success. Indeed, Mr. O'Donnell's obsessive personality may have contributed in
4 some measure to his success as a trial lawyer. As Dr. Martell explains:

5 The reasonable question arises, if Mr. O'Donnell was impaired by
6 Bipolar Disorder, how was he able to practice law so effectively?
7 It is this examiner's opinion that Mr. O'Donnell's high
8 intelligence, coupled with a highly experienced team of colleagues
9 and support staff, allowed him to compartmentalize his law
10 practice and channel his manic symptoms in ways that have
11 historically made him the successful litigator that he is today,
12 despite his bipolar illness.

13 Bipolar disorder has affected some of society's most productive
14 and creative people, as reflected by the life and work of famous
15 individuals such as Vincent van Gogh, Napoleon, Abraham
16 Lincoln, Edgar Allen Poe, Sir Isaac Newton, Winston Churchill,
17 Agatha Christie, T S Elliott, Francis Ford Coppola, Tennessee
18 Williams, Virginia Woolf, Robert Lowell, Rosemary Clancy,
19 Buzz Aldrin, Sting, Sylvia Plath, Sol Wachtler, Jonathan Winters,
20 Ben Stiller, Dick Cavett, Ted Turner, and [] Art Buchwald, among
21 many, many others

The energy and rapid thought processes that characterize mania can be channelled into careers of great creativity, focus, and productivity, and this is clearly the case with Mr O'Donnell's law practice (as well as his creative efforts as an author). However, the symptoms of the disorder also exact a significant toll in other areas of the individual's life. Mr O'Donnell has managed so far to spare his legal practices at the expense of his personal relationships, his health, his weight, and his financial solvency.

30 Martell at 11 Ironically, as noted above, one of the foremost experts on Bipolar Disorder – a
31 member of the Johns Hopkins' faculty and a widely published author on the subject – himself
32 suffers from the ravages Bipolar Disorder while maintaining a distinguished professional career.

33 D. General Counsel Meeting with Medical Experts

34 Because Mr. O'Donnell's mental health became a major issue in this matter, we have
35 repeatedly requested opportunities to present further evidence on this issue. Most recently, we

1 specifically requested that representatives of General Counsel attend a meeting with Dr Mills to
2 discuss his diagnosis of Mr O'Donnell in detail General Counsel declined to meet with Dr
3 Mills before the filing of this brief, but we have agreed with General Counsel to attempt to
4 arrange a meeting with Dr Mills shortly after the submission of this brief We specifically
5 reserve the right to supplement this brief in light of any developments at this meeting

6 **III ANALYSIS**

7 **A Statutory Provisions**

8 General Counsel recommend that the Commission find that Pierce O'Donnell knowingly
9 and willfully violated 2 U S C § 441f, the text of which is as follows

10 No person shall make a contribution in the name of another
11 person or knowingly permit his name to be used to effect such a
12 contribution, and no person shall knowingly accept a contribution
13 made by one person in the name of another person

14 2 U S C § 441f While this statute does not internally reference "knowing and willful" conduct
15 with respect to contributions in the name of another, such a heightened intent standard applies to
16 section 441f to the extent specified in 2 U S C § 437g In particular, section 437g establishes a
17 two-tiered penalty structure under which more severe sanctions are available in the case of
18 knowing and willful conduct than in the case of general intent violations of section 441f See 2
19 U S C § 437g(a)(5) & (6)(C) Moreover, 2 U S C § 437g(d) makes knowing and willful
20 violations of section 441f criminal acts punishable under Title 18

21 (A) Any person who knowingly and willfully commits a violation
22 of any provision of this Act which involves the making, receiving,
23 or reporting of any contribution, donation, or expenditure—

24 (i) aggregating \$25,000 or more during a calendar year shall be
25 fined under title 18, or imprisoned for not more than 5 years, or
26 both, or

27

1 (D) Any person who knowingly and willfully commits a violation
2 of section 441f of this title incurring an amount aggregating more
3 than \$10,000 during a calendar year shall be--

4 (i) imprisoned for not more than 2 years if the amount is less than
5 \$25,000 (and subject to imprisonment under subparagraph (A) if
6 the amount is \$25,000 or more),

7 (ii) fined not less than 300 percent of the amount involved in the
8 violation and not more than the greater of--

9 (I) \$50,000, or

10 (II) 1,000 percent of the amount involved in the violation,
11 or

12 (iii) both imprisoned under clause (i) and fined under clause (ii)

13 2 U S C § 437g(d)(1)(A) & (D)

14 The D C Circuit has interpreted the "knowing and willful" standard applicable to section
15 441f to require a finding of "defiance or knowing, conscious, and deliberate flaunting of the
16 Act" National Right to Work Comm. Inc v FEC, 716 F 2d 1401, 1403 (D C Cir 1983)
17 (internal quotation marks omitted) (citing AFL-CIO v FEC, 628 F 2d 97, 101 (D C Cir 1980))
18 As the court explained, the "distinction" between "knowing and willful" violations and ordinary
19 ones "is a real one the trier of fact must contend with," and the "knowing and willful" standard
20 must be satisfied with "'clear and convincing' evidence" AFL-CIO, 628 F 2d at 100 The D C
21 Circuit analogized the "knowing and willful" requirement of section 437g to the highest class of
22 violation of the Occupational Safety and Health Act, 29 U S C §§ 651-678 Under OSHA's
23 "non-serious," "serious," and "willful" metric for violations,

24 the court decided that the hearing officer had found facts sufficient
25 only to support a finding of a "serious" violation Given the
26 statutory context, a "willful" violation must necessarily connote
27 "defiance or such recklessness in regard of the consequences as to be
28 equivalent to a knowing, conscious, and deliberate flaunting of the
29 Act."

1 Id. at 101 (quoting Ivey v. Occupational Safety & Health Review Comm'n, 519 F.2d 1200, 1207
2 (3d Cir. 1975))

3 **B Severe Mental Illness Can Negate Heightened Intent**

4 As discussed above, each medical expert who evaluated Mr. O'Donnell agrees that his
5 severe mental illness prevented him from engaging in the alleged conduct in a "knowing and
6 willful" fashion. Although those opinions have their origins in clinical medicine, they have a
7 very real effect in court. In particular, federal law provides that severe mental illness can negate
8 the intent element of any crime requiring more than general intent.

9 Although the Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 17, 4241-4247, limits
10 the ability of a defendant to use a mental disease or defect as an excuse or justification for
11 violating federal law, "Congress did not bar the admissibility of all psychological evidence
12 pertaining to the defendant's mens rea (or lack thereof) in specific intent crimes." United States
13 v. Cameron, 907 F.2d 1051, 1052 (11th Cir. 1990). Rather, the courts have held that the
14 consideration of psychological evidence to negate mens rea does not constitute an impermissible
15 affirmative defense or excuse, but only serves to refute "an element of the offense." United
16 States v. Pohl, 827 F.2d 888, 897 (3d Cir. 1987). See also United States v. Brown, 326 F.3d
17 1143, 1147 (10th Cir. 2003) ("psychological or psychiatric evidence that negates the essential
18 element of specific intent can be admissible"), United States v. Warrall, 313 F.3d 867, 873 (4th
19 Cir. 2002) ("the circuits addressing this issue appear to agree that psychiatric testimony
20 regarding a defendant's mental condition can still be used in appropriate circumstances to
21 disprove specific intent"), United States v. Childress, 58 F.3d 693, 729 (D.C. Cir. 1995) ("we
22 find no general bar to evidence of a defendant's general 'lack of capacity' or the history of his
23 condition, so long as that evidence is adequately keyed to the issue of whether he entertained the
24 mens rea required for proof of the crime"), Haas v. Abrahamson, 910 F.2d 384, 397 (7th Cir.

1 1990) (permitting "relevant expert testimony detailing the defendant's mental health history
2 which might have a tendency to negate the prosecution's proof on the issue of intent"), United
3 States v. Twine, 853 F 2d 676, 679 (9th Cir 1987) ("Congress did not intend to eliminate a
4 defendant's ability to disprove guilt with mental defect evidence")

5 When considering evidence of psychological conditions, "the proper focus should be on
6 the proffered link or relationship between the specific psychiatric evidence offered and the ~~new~~
7 ~~rea~~ at issue in this case" Casper, 907 F 2d at 1067 n 31. The evidence will be permissible if it
8 helps determine whether a defendant "possessed a specific state of mind that would make him
9 guilty of a more serious crime than his conduct alone would support" Id at 1067

10 The forensic evidence in this case directly links Mr O'Donnell's severe mental illness
11 with his inability to satisfy the "knowing and willful" standard of sections 441f and 437g. The
12 experts who have examined Mr O'Donnell believe that he has suffered from a severe mental
13 illness for many years. Crausman at 1, Mills at 4, Martell at 9, Kenan at 1. This severe mental
14 illness directly effected Mr O'Donnell's ability knowingly and willfully to violate section 441f.
15 Dr Mills explains that "Mr O'Donnell's biological illness altered and distorted his judgment to
16 the point where, despite the explicit concerns of Ms Valdez, he perceived the legal
17 requirements" of section 441f as "irrelevant to his financial pledge and subsequent conduct".
18 Mills at 4. The forensic evidence demonstrates that Mr O'Donnell was not capable of acting in
19 "defiance or knowing, conscious, and deliberate flaunting" of the law at the relevant time.
20 Consequently, it would be improper for the Commission to find probable cause to believe that
21 Mr O'Donnell knowingly and willfully violated section 441f, his severe mental illness rendered
22 him incapable of forming this heightened level of intent.

1 C Sentencing Guidelines Also Recognize Mental Illness as Basis for Departure
2 Consideration in the Penalty Phase

3 Apart from its impact on legal determinations of guilt or innocence (on which we rely
4 above), federal law also recognizes that severe mental illness is properly considered in
5 determining the appropriate sanction for criminal conduct. In particular, the United States
6 Sentencing Commission has determined that downward departure should be granted in
7 sentencing a defendant (1) who suffered from a significantly reduced mental capacity at the time
8 of the offense and (2) whose reduced mental capacity contributed substantially to the
9 commission of the offense. See U.S.S.G. § 5K2.13 (2005). The purpose of this policy statement
10 is to show lenity to those individuals whose reduced mental capacity played a major role in the
11 commission of an offense. See United States v. Weddle, 30 F.3d 532, 539 (4th Cir. 1994).

12 With respect to the first element, the Sentencing Commission's application note specifies
13 that "significantly reduced mental capacity" exists when "the defendant, although convicted, has
14 a significantly impaired ability to . . . control behavior that the defendant knows is wrongful."
15 U.S.S.G. § 5K2.13, app. n.1. The Ninth Circuit defines "reduced mental capacity" broadly in
16 this context, referring to it as "a lack of full intellectual functioning." United States v. Carty, 12
17 F.3d 1506, 1512 (9th Cir. 1995). A defendant may be eligible for downward departure
18 regardless of the nature or severity of the mental disorder. Id. at 1513. The guideline requires
19 "only that the defendant suffer from a significantly reduced mental capacity." It concerns the
20 effect of the impairment on the defendant, not the characteristics or seriousness of the
21 impairment itself." Id. (emphasis in original). Similarly, the defendant's mental disorder need
22 not be extraordinary, unique, or unheard of. See United States v. Shore, 143 F. Supp. 2d 74, 80
23 (D. Mass. 2001).

1 With regard to the second element of the policy statement, "the disorder need be only a
2 contributing cause, not a but-for cause or a sole cause, of the offense" Cantu, 12 F 3d at 1515
3 In Cantu, the Ninth Circuit read other opinions as standing for the proposition that the policy
4 statement requires only that the mental condition contribute to the mental disorder, while the
5 actual degree of contribution was not defined Id. One court has held that the critical inquiry in
6 applying section 5K2.13 is "whether the psychological problems impaired the defendant's
7 judgment at the time of the offense" United States v. Herbert, 902 F Supp 827, 828-29 (N D
8 Ill 1995)

9 Although these federal sentencing principles do not bear directly on Commission
10 proceedings, they do suggest a strong legal recognition for the propriety of dealing
11 compassionately with those who, because of their mental illness, lack the capacity to conform
12 their conduct to the law

1 IV CONCLUSION

2 For the foregoing reasons, Mr O'Donnell cannot be said to have committed a "knowing
3 and willful" violation of the Federal Election Campaign Act, his mental illness negates the
4 specific intent element of the statute Accordingly, we respectfully request that the Commission
5 decline to find probable cause to believe that Pierce O'Donnell knowingly and willfully violated
6 2 U S C § 441f

Respectfully submitted,

 2

Mark H Tuohey III
David E Hawkins
VINSON & ELKINS L L P
The Willard Office Building
1455 Pennsylvania Avenue, N W , Suite 600
Washington, DC 20004-1008
Telephone (202) 639-6500
Facsimile (202) 639-6604
mtuohey@velaw.com
dhawkins@velaw.com

DATED December 11, 2006

Attorneys for Respondent Pierce O'Donnell

Exhibits

- 1 July 31, 2006, letter from Mills to Tuohey ("Mills")
- 2 Curriculum vitae of Dr Mark J Mills
- 3 July 8, 2006, letter from Martell to Robbins ("Martell")
- 4 July 31, 2006, letter from Crausman to Tuohey ("Crausman")
- 5 November 30, 2006, letter from Kenan to Tuohey ("Kenan")